

## IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0522

**ORIGINAL**

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROLAND DEE TIREY,

Defendant and Appellant.

**FILED**

AUG 02 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

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**MOTION FOR RECUSAL**

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Appellant Roland Dee Tirey, through the undersigned counsel, respectfully requests that Chief Justice Mike McGrath recuse himself from participation in this appeal. Mr. Tirey's Reply Brief will be filed contemporaneously with this motion.

**BACKGROUND**

Mr. Tirey's sentence was imposed in 1997 under the 1995 sentencing statute. His suspended sentence was revoked on March 19, 2009. Mr. Tirey has asserted the district court exceeded its statutory authority under Mont. Code Ann. § 46-18-203 (1995) when additional conditions were subsequently imposed on his suspended sentence. (Appellant's Br. at 23-28).

In response, the State has cited Mont. Code Ann. § 46-18-203 (2003) and (2007) in support of its argument that the legislature has clearly stated its intent to apply the 2003 and 2007 versions retroactively to the sentence imposed on Mr. Tirey under the 1995 statute. (Appellee's Br. at 23-39.)

The legislative history of § 46-18-203(9) (2003) indicates this amendment was proposed by the Montana Department of Justice (DOJ), during Attorney General McGrath's tenure, for the purpose of "alleviating the burden of applying old, outmoded laws." (Appellee's Br. at 24-25, *citing* Mont. H. Judiciary Comm., *Hearing on H.B. 170*, 58<sup>th</sup> Leg., Reg. Sess., Ex. 3 (Jan. 20, 2003).) The 2003 amendment was enacted to supercede this Court's holding in *State v. Brister*, 2002 MT 13, ¶ 26, 308 Mont. 154, 41 P.3d 314. While he served as the Attorney General, Chief Justice McGrath represented the State in *Brister*.

The State has further cited to Mont. Code Ann. § 46-18-203 (7)(a)(iii) (2007) as applicable to Mr. Tirey's revocation based upon the legislature's retroactive intent. (Appellee's Br. at 29-35.) The sponsor of the legislation thanked Attorney General Mike McGrath and his staff for their diligent and indescribable work and help with the legislation. Mont. Sen. Comm. on Judiciary, *Hearing on S.B. 547*, 60<sup>th</sup> Leg., Reg. Sess., Audio 2:18:48-2:19:37; Mont. H. Judiciary Comm., *Hearing on S.B. 547*, 60<sup>th</sup> Leg., Reg. Sess., Audio 39:17 – 41:00 (March 28, 2007).

This statute (not this particular section) was amended as part of a comprehensive legislative package known as Jessica's Law of Montana, designed to require the State to tighten its supervision over Level III offenders (high risk to reoffend). Mr. Tirey contends the State's responsive argument, as applied to him as a Level I offender, lacks the fair notice and governmental restraint when the legislature increased his punishment beyond what was prescribed when the crime was committed. *State v. Leistiko*, 256 Mont. 32, 36, 844 P.2d 97, 100 (1992), citing *Calder v. Bull*, 3 U.S. 269 (1798).

Mr. Tirey has asserted the 1995 revocation statute controls any revocation of the suspended portion of his sentence. (Appellant's Br. at 23-28, citing *State v. White*, 2008 MT 464, 348 Mont. 196, 199 P.3d 274; *State v. Rudolph*, 2005 MT 41, 326 Mont. 132, 107 P.3d 496; *State v. Brister*, 2002 MT 13, 308 Mont. 154, 41 P.3d 314; *State v. Tracy*, 2005 MT 128, 327 Mont. 220, 113 P.3d 297; *State v. Azure*, 179 Mont. 281, 587 P.2d 1297.)

The State has asked this Court to overturn *White* and *Rudolph* due to alleged incorrect "assumptions" regarding the meaning of the phrase "sentence imposed." (Appellee's Br. at 38.) While he served as Attorney General, Chief Justice McGrath represented the State in both *White* and *Rudolph*.

## LEGAL ANALYSIS

Rule 1.12 of the Code of Judicial Conduct provides:

- (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

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- (5) The judge:

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- (b) Served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy.

Rule 1.12(A)(5)(b), Code of Judicial Conduct.

This Court has held that Chief Justice McGrath, having previously served as Montana's Attorney General, "is only required to disqualify himself from cases in which he, as Attorney General, participated personally and substantially or in which he expressed an opinion concerning the merits of the matter in controversy." *State v. Ellis*, 2009 MT 58, ¶ 3, 349 Mont. 317, 206 P.3d 564.

An attorney's personal and substantial participation in a matter is reviewed on a case-by-case basis. *Ellis*, ¶ 4. As the Attorney General, Chief Justice McGrath represented the State in *White* and *Rudolph*, decisions the State now seeks to have overruled. As the Attorney General, Chief Justice McGrath had supervisory oversight over those individuals who appeared before the legislature to

testify as proponents of legislation involved in Mr. Tirey's appeal. These individuals include Mr. John Connor and Ms. Ali Bovington. Further, Senator Perry, sponsor of Jessica's Law of Montana, extended his thanks to Attorney General McGrath. Mont. Sen. Comm. on Judiciary, *Hearing on S.B. 547*, 60<sup>th</sup> Leg., Reg. Sess., Audio 02:18:48-02:19:37 (Feb. 22, 2007).

### **CONCLUSION**

Under these facts, Chief Justice McGrath has participated personally and substantially in this matter and has publicly expressed an opinion concerning the law that is in controversy. His impartiality might reasonably be questioned, and he should recuse himself from this matter.

Assistant Attorney General Sheri K. Sprigg, counsel for the State, has been contacted and was provided with a draft version of this motion. On behalf of the State, Ms. Sprigg objects to this motion.

Respectfully submitted this 2<sup>nd</sup> day of August, 2010.

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing

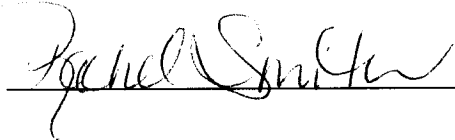
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